

Amendment No. 1 to HB3861

Coleman
Signature of Sponsor

AMEND Senate Bill No. 3522*

House Bill No. 3861

by deleting all language after the enacting clause and by substituting instead the following:

SECTION 1. Tennessee Code Annotated, Section 35-6-409, is amended by deleting it in its entirety and by substituting instead the following:

§ 35-6-409. DEFERRED COMPENSATION, ANNUITIES, AND SIMILAR PAYMENTS.

(a) In this section:

(1) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one(1) or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer. For purposes of subsections (d), (e), (f), and (g), the term also includes any payment from any separate fund, regardless of the reason for the payment.

(2) "Separate fund" includes, without limitation, a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest, a dividend, or a payment made in lieu of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other

payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent (10%) of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection (c), a payment is not “required to be made” to the extent that it is made because the trustee exercises a right of withdrawal.

(d) Except as otherwise provided in subsection (e), subsections (f) and (g) apply, and subsections (b) and (c) do not apply, in determining the allocation of a payment made from a separate fund to:

(1) A trust to which an election to qualify for a marital deduction under 26 U.S.C. § 2056(b)(7) or § 67-8-315(a)(6); or

(2) A trust that qualifies for the marital deduction under 26 U.S.C. § 2056(b)(5).

(e) Subsections (d), (f), and (g) do not apply if and to the extent that the series of payments would, without the application of subsection (d), qualify for the marital deduction under 26 U.S.C. § 2056(b)(7)(C).

(f) A trustee shall determine the internal income, without regard to its receipt by the trustee, of each separate fund for the accounting period as if the separate fund were a trust subject to this chapter. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the

surviving spouse. The trustee shall allocate the balance of the payment to principal.

Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(g) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal at least three percent (3%) of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under 26 U.S.C. § 7520, for the month preceding the accounting period for which the computation is made.

(h) This section does not apply to a payment to which § 35-6-410 applies.

SECTION 2. Tennessee Code Annotated, Section 35-6-505, is amended by deleting it in its entirety and by substituting instead the following:

§ 35-6-505. INCOME TAXES.

(a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid:

(1) From income to the extent that receipts from the entity are allocated only to income;

(2) From principal to the extent that receipts from the entity are allocated only to principal;

(3) Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(4) From principal to the extent that the tax exceeds the total receipts from the entity.

(d) After applying subsections (a) through (c), the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

SECTION 3. Tennessee Code Annotated, Section 35-15-302, is amended by deleting the introductory phrase: "To the extent there is no conflict of interest" and replacing it with the introductory phrase: "To the extent there is no material conflict of interest".

SECTION 4. Tennessee Code Annotated, Section 35-15-303, is amended by deleting the introductory phrase: "To the extent there is no conflict of interest" and replacing it with the introductory phrase: "To the extent there is no material conflict of interest".

SECTION 5. Tennessee Code Annotated, Section 35-15-304, is amended by deleting the closing phrase: "but only to the extent there is no conflict of interest between the representative and the person represented." and replacing it with the closing phrase: "but only to the extent there is no material conflict of interest between the representative and the person represented.".

SECTION 6. Tennessee Code Annotated, Section 35-15-505(a)(2), is amended by deleting the introductory phrase: "Except as provided in chapter 16 of this title regarding investment services trusts," and replacing it with the introductory phrase: "Except as provided in chapter 16 of this title regarding investment services trusts and subdivision (a)(3) regarding a special needs trust".

Tennessee Code Annotated, Section 35-15-505(a), is further amended by renumbering subdivision (a)(3) as subdivision (a)(5), and adding new subdivisions (a)(3) and (a)(4) as follows:

(a)

(3) For the purposes of this section “special needs trust” means a trust established for the benefit of one or more disabled persons, which includes, but is not limited to, any individual who is disabled pursuant to 42 U.S.C. §1382(a), as well as any individual who is disabled pursuant to any similar federal, state or other jurisdictional law or regulation, or has a condition that is substantially equivalent to one that qualifies them to be so disabled in accordance with any of the above even if not officially found to be so disabled by a governmental body if one of the purposes of the trust, expressed in the trust instrument or implied from the trust instrument, is to allow the disabled person to qualify or continue to qualify for public, charitable or private benefits that might otherwise be available to the disabled person. The existence of one or more nondisabled remainder beneficiaries of the trust shall not disqualify it as a special needs trust for the purposes of this section.

(4) No creditor or assignee of the settlor of an irrevocable special needs trust, as defined in subdivision (a)(3), may reach or compel distributions from such special needs trust, to or for the benefit of the settlor of such special needs trust, or otherwise.

SECTION 7. Tennessee Code Annotated, Section 35-15-505, is further amended by adding a new subsection (d) as follows:

(d) With respect to an irrevocable trust for which the settlor made a qualified election pursuant to 26 U.S.C. § 2523(f), the power of a trustee, and any benefit resulting to the settlor from any exercise of such power, whether arising under the trust

agreement or any other provision of the law, to make a distribution to or for the benefit of a settlor or to otherwise permit the settlor to use or benefit from trust property following the death of the settlor's spouse, shall not be considered an amount that may be distributed to or for the settlor's benefit for purposes of subdivision (a)(2).

SECTION 8. Tennessee Code Annotated, Section 35-15-802, is amended by renumbering subsections (g) through (i) as subsections (j) through (l), respectively, deleting subsection (f) in its entirety and inserting new subsections (f) through (i) as follows:

(f) In addition to all other permissible investments and delegatable duties listed in this title, so long as they are fairly priced and in accordance with the interest of the beneficiaries and the interests of the fiduciary's appointment and otherwise comply with chapter 14 of this title, a fiduciary may purchase, sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment, as well as delegate to an affiliate or other agent associated with the fiduciary and, upon satisfaction of the conditions stated in subsection (h), such fiduciary may receive fiduciary compensation from such account at the same rate as the fiduciary would otherwise be entitled to be compensated. Such activities shall occur without any presumption of a conflict between personal and fiduciary interests of the trustee or other fiduciary.

(g) As used in this section:

(1) "Affiliate" means any corporation or other entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the fiduciary.

(2) "Affiliated investment" means an investment for which the fiduciary or an affiliate of the fiduciary acts as adviser, administrator, distributor, placement agent, underwriter, broker or in any other capacity for which it receives or has received a fee or commission from such investment or an investment acquired or disposed of in a transaction for which the fiduciary or an affiliate of the fiduciary

receives or has received a fee or commission. "Affiliated investment" also means an investment in an insurance contract purchased from an insurance agency owned by, or affiliated with, the fiduciary, or any of its affiliates.

(3) "Delegate to an affiliate or associated agent" means a proper delegation of any duty of the fiduciary to any person or entity that is affiliated with or associated with, the fiduciary. The action of doing any of the above shall be known as a "Delegation to an affiliate or associated agent."

(4) "Fee or commission" means compensation paid to a fiduciary or an affiliate thereof on account of its services to or on behalf of an investment.

(5) For purposes of this section, fiduciary includes any trustee, which has the same meaning as in § 35-14-102, as well as any other fiduciary.

(6) "Investment" shall mean any security as defined in §2(a)(1) of the Securities Act of 1933, any contract of sale of a commodity for future delivery within the meaning of §2(i) of the Commodity Exchange Act, or any other asset permitted for fiduciary accounts pursuant to the terms of chapter 14 of this title or by the terms of the governing instrument, including by way of illustration and not limitation, shares or interests in a public or private investment fund, including, but not limited to, a private investment fund organized as a limited partnership, limited liability company, a statutory or common law business trust, or a real estate investment trust, joint venture or other general or limited partnership, or an open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940.

(h) A fiduciary seeking compensation pursuant to subsection (f) shall disclose to each principal in an agency relationship, and to all current recipients of account statements of any other fiduciary account, all fees or commissions paid or to be paid by the account, or received or to be received by an affiliate arising from such affiliated

investment or delegation to an affiliate or associated agent. The disclosure required under this subsection may be given either in a copy of the prospectus or any other disclosure document prepared for the affiliated investment under federal or state securities laws or in a written summary that includes all fees or commissions received or to be received by the fiduciary or any affiliate of the fiduciary and an explanation of the manner in which such fees or commissions are calculated, either as a percentage of the assets invested or by some other method. Such disclosure shall be made at least annually unless there has been no increase in the rate at which such fees or commissions are calculated since the most recent disclosure. Notwithstanding this subsection (h), no such disclosure is required if the governing instrument or a court order expressly authorizes the fiduciary to invest the fiduciary account in affiliated investments or to perform the delegation to an affiliate or associated agent.

(i) A fiduciary that has complied with subsection (h), whether by making the applicable disclosure or by relying on the terms of a governing instrument or court order, shall have full authority to administer an affiliated investment, including the authority to vote proxies thereon, without regard to the affiliation between the fiduciary and the investment or the fiduciary and delegatee, as the case may be.

SECTION 9. Tennessee Code Annotated, Section 35-15-813, is amended by adding a new subsection (g) to read as follows:

(g) If the trustee of a trust is bound by any written confidentiality restrictions with respect to an asset of a trust, a trustee may require that any beneficiary who is eligible to receive information pursuant to this or any other section of this title about such asset shall agree in writing to be bound by the confidentiality restrictions that bind the trustee before receiving such information from the trustee.

SECTION 10. Tennessee Code Annotated, Section 35-15-1010, is amended by renumbering subsection (c) as subsection (d), deleting subsection (b) in its entirety, and adding new subsections (b) and (c) as follows:

(b) Except as otherwise provided in subsection (a) or (c), the debts, obligations and liabilities incurred by a trustee by reason of the ownership, management or control of trust property in the trustee's fiduciary capacity, shall be enforceable solely against the trust and its property, without any obligation or liability personally being borne by any trustee of such trust.

(c) A trustee is personally liable for torts committed in the course of administering a trust only if the trustee is personally at fault on account of the trustee's own willful misconduct proven by clear and convincing evidence.

SECTION 11. Tennessee Code Annotated, Section 35-15-1011, is amended by deleting subsection (b) in its entirety and inserting a new subsection (b) as follows:

(b) Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault on account of the trustee's own willful misconduct proven by clear and convincing evidence.

SECTION 12. Tennessee Code Annotated, Section 35-15-1011(c), is amended by deleting the following phrase: "or is held by the trustee's spouse or one (1) or more of the trustee's descendants, siblings, or parents, or the spouse of any of them".

SECTION 13. Tennessee Code Annotated, Section 35-16-102(14), is amended by deleting the subdivision in its entirety and substituting instead the following:

(14) "Transferor" means a person who, directly or indirectly, makes a disposition or causes a disposition to be made in such person's capacity:

(A) As an owner of property

(B) As a holder of a power of appointment that authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate or the creditors of the holder's estate; or

(C) As a trustee.

SECTION 14. Tennessee Code Annotated, Section 35-16-104(a), is amended by adding the following phrase to the end “, and, in the case of a creditor whose claim arose after a qualified disposition, unless the qualified disposition was also made with actual intent to defraud such creditor.”

SECTION 15. Tennessee Code Annotated, Section 35-16-104(d), is amended by deleting the phrase “neither the” in the first sentence and replacing it with the phrase “neither a.”

SECTION 16. Tennessee Code Annotated, Section 35-16-104, is further amended by adding a new subsection (j) as follows:

(j) Subsection (i) shall not apply to any claim for forced heirship, legitime or elective share.

SECTION 17. Tennessee Code Annotated, Section 35-16-105, is amended by adding the following sentence after the first sentence: “The powers and rights conferred by the Investment Services Trust upon the transferor are personal powers and rights that may not be exercised by a creditor or any other person, except as expressly permitted by the trust.”

SECTION 18. Tennessee Code Annotated, Section 35-16-109, is amended by deleting the phrase “, but the person may not otherwise serve as advisor to a trust that is a qualified disposition except with respect to the retention of the veto right permitted by § 35-15-111(1)”.

SECTION 19. Tennessee Code Annotated, Section 35-16-111, is amended by deleting the word “and” at the end of subsection (7); by deleting the period at the end of subsection (8) and substituting instead a semicolon (;) and by adding subsections (9), (10) and (11) to read as follows:

(9) The transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on income of the trust if such potential or actual receipt of income or principal is pursuant to a provision in the trust instrument that expressly permits a distribution to the transferor as reimbursement for such taxes and if such distribution would be the result of a qualified trustee's or qualified trustees' acting:

(A) In such qualified trustee's or qualified trustees' discretion or pursuant to a mandatory direction in the trust instrument; or

(B) At the direction of an adviser described in § 35-16-108, who is acting in such adviser's discretion;

(10) The ability, whether pursuant to direction in the investment services trust or discretion of a qualified trustee to pay, after the death of the transferor, all or any part of the debts of the transferor outstanding at the time of the transferor's death, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate; and

(11) A qualified trustee's or qualified trustees' authority to make distributions to pay taxes in lieu of or in addition to the power to make a distribution for taxes pursuant to subdivision (3), (6), (9), or (10) by direct payment to the taxing authorities.

SECTION 20. Tennessee Code Annotated, Section 66-1-202(f), is amended by deleting the subsection in its entirety and substituting instead the following:

(f) As to any trust created after June 30, 2007, or that becomes irrevocable after June 30, 2007, the terms of the trust shall require that all beneficial interests in the trust vest or terminate or the power of appointment is exercised within three hundred sixty (360) years.

SECTION 21. Tennessee Code Annotated, Title 35, is amended by adding the following as a new appropriately numbered chapter.

§ 35-17-101. TOTAL RETURN UNITRUSTS.

(a) In this section:

(1) "Disinterested person" means a person who is not a "related or subordinate party," as defined in 26 U.S.C. § 672(c), with respect to the person then acting as trustee of the trust and excludes the trustor of the trust and any interested trustee;

(2) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one (1) or more persons, either in fixed proportions or in amounts or proportions determined by the trustee and regardless of whether the trust directs or permits the trustee to distribute the principal of the trust to one (1) or more such persons;

(3) "Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a "related or subordinate party," as defined in 26 U.S.C. § 672(c), with respect to such distributee;

(4) "Interested trustee" means an individual trustee who is a qualified beneficiary or any trustee who may be removed and replaced by an interested distributee, or an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust;

(5) "Internal Revenue Code" refers to the Internal Revenue Code of 1986, as amended from time to time, and any references to a section of such shall include any successor, substituted, or amended section of the Internal Revenue Code;

(6) "Total return unitrust" means an income trust that has been converted under this section or the laws of any other jurisdiction that permits an income

trust to be converted to a trust in which a unitrust amount is treated as the net income of the trust;

(7) "Trustee" means all persons acting as trustee of the trust, except where expressly noted otherwise, whether acting in their discretion or on the direction of one (1) or more persons acting in a fiduciary capacity;

(8) "Trustor" means an individual who created an inter vivos or a testamentary trust;

(9) "Qualified Beneficiaries" means those beneficiaries of a trust specified in § 35-15-103(13); and

(10) "Unitrust amount" means an amount computed as a percentage of the fair market value of the trust.

(b) A trustee, other than an interested trustee, or where two (2) or more persons are acting as trustee, a majority of the trustees who are not an interested trustee, in either case hereafter "trustee", may, in its sole discretion and without court approval:

(1) Convert an income trust to a total return unitrust;

(2) In the case of a total return unitrust converted under this section or the laws of any other jurisdiction, reconvert a total return unitrust to an income trust; or

(3) In the case of a total return unitrust converted under this section or the laws of any other jurisdiction, change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply:

(A) The trustee adopts a written policy for the trust providing:

(i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income;

(ii) In the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts; or

(iii) That the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(B) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this section, to the trustor of the trust, if living, and to all qualified beneficiaries of the trust;

(C) At least one (1) person receiving notice under subdivision (b)(3)(B) is legally competent; and

(D) No person receiving such notice objects, by written instrument delivered to the trustee, to the proposed action of the trustee within thirty (30) days of receipt of such notice.

(c) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two (2) or more persons are acting as trustee and are interested trustees, a majority of such interested trustees may, in its sole discretion and without court approval:

(1) Convert an income trust to a total return unitrust;

(2) Reconvert a total return unitrust to an income trust; or

(3) Change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply:

(A) The trustee adopts a written policy for the trust providing:

(1) In the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income;

(2) In the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts; or

(3) That the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(B) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee:

(1) The percentage to be used to calculate the unitrust amount;

(2) The method to be used in determining the fair market value of the trust; and

(3) Which assets, if any, are to be excluded in determining the unitrust amount;

(C) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this section, and the determinations of the disinterested person to the trustor of the trust, if living and to all qualified beneficiaries of the trust'

(D) At least one (1) person receiving notice under subdivision (c)(3)(C). of this section is legally competent; and

(E) No person receiving such notice objects, by written instrument delivered to the trustee, to the proposed action or the determinations of the disinterested person within thirty (30) days of receipt of such notice.

(d) If any trustee desires to convert an income trust to a total return unitrust, reconvert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust but does not have the ability to or elects not to do it under the provisions of subsection (b) or (c), the trustee may petition the court for such order as the trustee deems appropriate. In the event, however, there is only one (1) trustee of such trust and such trustee is an interested trustee or in the event there are two (2) or more trustees of such trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of such trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present such information to the court as shall be necessary to enable the court to make its determinations hereunder.

(e) The fair market value of the trust shall be determined at least annually, using such valuation date or dates or averages of valuation dates as are deemed appropriate. Assets for which a fair market value cannot be readily ascertained shall be valued using such valuation methods as are deemed reasonable and appropriate. Assets used by a trust beneficiary, such as a residence property or tangible personal property, may be excluded from fair market value for computing the unitrust amount.

(f) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event not less than three (3) percent nor more than five (5) percent, taking into account the intentions of the trustor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

(g) Following the conversion of an income trust to a total return unitrust, the trustee:

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) After calculating the trust's capital gain net income described in 26 U.S.C. § 1222(9), may consider the unitrust amount as paid from net short-term capital gain described in 26 U.S.C. § 1222(5) and then from net long-term capital gain described in 26 U.S.C. § 1222(7); and

(4) Shall then consider the unitrust amount as coming from the principal of the trust.

(h) In administering a total return unitrust, the trustee may, in its sole discretion but subject to the provisions of the governing instrument, determine:

(1) The effective date of the conversion;

(2) The timing of distributions, including, but not limited to, provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases;

(3) Whether distributions are to be made in cash or in kind or partly in cash and partly in kind;

(4) If the trust is reconverted to an income trust, the effective date of such reconversion; and

(5) Such other administrative issues as may be necessary or appropriate to carry out the purposes of this section.

(i) Conversion to a total return unitrust under the provisions of this section shall not affect any other provision of the governing instrument, if any, regarding distributions of principal.

(j) In the case of a trust for which a marital deduction has been taken for federal tax purposes under 26 U.S.C. § 2056 or § 2523, the spouse otherwise entitled to receive the net income of the trust shall have the right, by written instrument delivered to the trustee, to compel the reconversion during that spouse's lifetime of the trust from a total return unitrust to an income trust, notwithstanding anything in this section to the contrary.

(k)

(1) This section shall be construed as pertaining to the administration of a trust and shall be available to any trust including a trust initially converted to a total return unitrust under the laws of another jurisdiction that is administered in Tennessee under Tennessee law or to any trust, regardless of its place of administration, whose governing instrument provides that Tennessee law governs matters of construction or administration unless:

(A) The governing instrument reflects an intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust;

(B) The trust is a pooled income fund described in 26 U.S.C. § 642(c)(5) or a charitable-remainder trust described in 26 U.S.C. § 664(d);

(C) The governing instrument expressly prohibits use of this section by specific reference to the section or expressly states the trustor's intent that net income not be calculated as a unitrust amount.

(2) Any of the following statements in the governing instrument, or words similar to such statements, shall be sufficient to preclude the use of this section:

**The provisions of § 35-17-102, as amended, or
any corresponding provision of future law, shall not be
used in the administration of this trust.**

or

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**My trustee shall not determine the distributions
to the income beneficiary as a unitrust amount.**

(l) Any trustee or disinterested person who in good faith takes or fails to take any action under this section shall not be liable to any person affected by such action or inaction, regardless of whether such person received written notice as provided in this section and regardless of whether such person was under a legal disability at the time of the delivery of such notice. Such person's exclusive remedy shall be to obtain an order of the court directing the trustee to convert an income trust to a total return unitrust, to reconvert from a total return unitrust to an income trust or to change the percentage used to calculate the unitrust amount.

(m) This section shall be available to trusts in existence at the date of enactment or created thereafter.

§ 35-17-102. EXPRESS TOTAL RETURN UNITRUSTS.

(a) This section shall apply to a trust that, by its governing instrument, requires or permits the distribution, at least annually, of a unitrust amount equal to a fixed percentage of not less than three percent (3%) nor more than five percent (5%) per year of the fair market value of the trust's assets, valued at least annually, such trust to be referred to in this section as an "express total return unitrust."

(b) The unitrust amount for an express total return unitrust may be determined by reference to the fair market value of the trust's assets in one (1) year or more than one (1) year.

(c) Distribution of such a fixed percentage unitrust amount is considered a distribution of all of the income of the express total return unitrust.

(d) An express total return unitrust may or may not provide a mechanism for changing the unitrust percentage similar to the mechanism provided under § 35-17-101, based upon the factors noted therein, and may or may not provide for a conversion from

a unitrust to an income trust and/or a reconversion of an income trust to a unitrust similar to the mechanism under § 35-17-101.

(e) If an express total return unitrust does not specifically or by reference to § 35-17-101 deny a power to change the unitrust percentage or to convert to an income trust, then the trustee shall have such power and the express total return unitrust shall be deemed to be a "total return unitrust" within the meaning of § 35-17-101 for purposes of applying § 35-17-101 to the trust.

(f) The distribution of a fixed percentage of not less than three percent (3%) nor more than five percent (5%) reasonably apportions the total return of an express total return unitrust.

(g) The trust instrument may grant discretion to the trustee to adopt a consistent practice of treating capital gains as part of the unitrust distribution, to the extent that the unitrust distribution exceeds the net accounting income, or it may specify the ordering of such classes of income.

(h) Unless the terms of the trust specifically provide otherwise, a distribution of the unitrust amount from an express total return unitrust shall be considered to have been made from the following sources in order of priority:

(1) From net accounting income determined as if the trust were not a unitrust;

(2) From ordinary income not allocable to net accounting income;

(3) After calculating the trust's capital gain net income as described in 26 U.S.C. § 1222(9), from net realized short-term capital gain as described in 26 U.S.C. § 1222(5) and then from net realized long-term capital gain described in 26 U.S.C. § 1222(7); and

(4) From the principal of the trust.

(i) The trust instrument may provide that assets:

(1) For which a fair market value cannot be readily ascertained shall be valued using such valuation methods as are deemed reasonable and appropriate; and

(2) Used by a trust beneficiary, such as a residence property or tangible personal property, may be excluded from the net fair market value for computing the unitrust amount.

(j) In this section, "Internal Revenue Code" refers to the Internal Revenue Code of 1986, as amended from time to time, and any references to a section thereof shall include any successor, substituted, or amended section of the Internal Revenue Code.

SECTION 22. The Tennessee Code Commission is requested to update and publish the revised Official Comments of the Uniform Law Commissioners to these sections of Tennessee Code Annotated, 35-6-409 and 35-6-505, as amended, by Sections 1 and 2 of this Act, respectively.

SECTION 23. The Tennessee Code Commission is requested to add and publish the following legislative comments regarding 2010 Amendments to the official comments in the applicable sections:

(1) Tennessee Code Annotated, Section 35-15-302.

2010 Amendment.

This section was amended to make it clear that the standard used to determine whether no conflict exists, and therefore, representation is available, is subject to a test of materiality. Therefore, it is not necessary that no conflict, whatsoever, exist in order to avail oneself of representation, only that no material conflict exist.

(2) Tennessee Code Annotated, Section 35-15-303.

2010 Amendment.

This section was amended to make it clear that the standard used to determine whether no conflict exists, and therefore, representation is available, is subject to a test of materiality. Therefore, it is not necessary that no conflict, whatsoever, exist in order to avail oneself of representation, only that no material conflict exist.

(3) Tennessee Code Annotated, Section 35-15-304.

2010 Amendment.

This section was amended to make it clear that the standard used to determine whether no conflict exists, and therefore, representation is available, is subject to a test of materiality. Therefore, it is not necessary that no conflict, whatsoever, exist in order to avail oneself of representation, only that no material conflict exist.

(4) Tennessee Code Annotated, Section 35-15-802.

2010 Amendment.

Subsection (f) through (i) clearly grant the express authority to use affiliates and related parties or affiliated delegates to manage assets and perform administrative functions. This increases flexibility and grants fiduciaries the ability to leverage expertise inside their broad organization. Versus the common law, the Restatement of Trusts (Third) and the “uniform” Uniform Trust Code and Uniform Prudent Investor Act, these provisions grant exceptions to the no further inquiry rule relative to conflicts of interests for investments and other transactions between affiliates so long

as these transactions are fairly priced, are in accordance with the interests of the beneficiaries and the interests of the fiduciary appointment and otherwise comply with the Tennessee Uniform Prudent Investor Act. Under most circumstances, a fiduciary must disclose, at least annually (unless there has been no change) to the beneficiaries entitled to receive a copy of the trustee's annual report, the rate and method by which any additional compensation paid, earned or received from or by any affiliate was determined.

(5) Tennessee Code Annotated, Section 35-15-813.

2010 Amendment.

Subsection (g) assures that if a trustee is required to keep certain information regarding trust assets confidential the trustee can be assured that he / she can carry out their duty to inform and report to beneficiaries without fear of indirectly breaching the trustee's duty of confidentiality. This is often of special importance when a closely held asset is held by a trust.

SECTION 24. This act shall take effect on July 1, 2010, the public welfare requiring it.